84-1826

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No. 84-_____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

J. JEROME PREVATTE, INDIVIDUALLY
AND WACO FINANCIAL, INC.

Petitioners,

v.

BENJAMIN F. GIBSON

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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38 pp

QUESTIONS PRESENTED

1. Is a writ of mandamus the proper means of obtaining recusal of a federal district court judge after such judge presided over the hearing and refused to disqualify himself under, 28 U.S.C. §§ 144 and 455 recusal procedure?

2. Is it proper for a Judge to preside over a hearing on his own recusal where he is represented by counsel for one of the party defendants to the action which is the subject of the recusal affidavit?

3. Can a pro se litigant employ the recusal rights of § 144 and § 455 or is such a litigant barred therefrom by reason of the certificate of counsel requirement.

4. Is extrajudicial Ex-parte contact between a litigant and the court which created the appearance of impropriety and predjudice sufficient for recusal?

PARTIES INVOLVED

Petitioners, J. Jerome Prevatte is the President, Financial Principal and Major Shareholder of Waco Financial, Inc. Waco was a small securities dealer operating in Kalamazoo, Michigan. Waco, with five to seven employees, did a general securities business consisting of listed and over the counter securities, bonds, and tax sheltered investments. A large portion of Waco's business was in the discount securities markets. Waco due to a number of actions brought by the NASD and SEC was forced to close its operation in July of 1981, after the hearing, SEC v. Waco Financial, Inc. and J. Jerome Prevatte, 518 F. Supp 611 (W.D. Mich. 1981), in Respondent's Court.

Prevatte and Waco continue in litigation with the SEC and NASD at this date. Here, petitioners seek review of a federal district court judge's refusal to recuse himself in the lower court case, J. Jerome Prevatte, et al., v National Association of Securities Dealers, et al; K84-99 CA (W.D. Mich.).

Respondent, Benjamin F. Gibson, is a Federal District Court Judge for the Western District of Michigan. Prior to his appointment by the then President of the United States, James Earl Carter, Mr. Gibson was a sole practitioner in Lansing, Michigan.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-_____

J. JEROME PREVATTE AND WACO FINANCIAL, INC.
Petitioners,

v.

BENJAMIN F. GIBSON
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, J. Jerome Prevatte and Waco Financial, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the very important matter of the propriety of a mandamus to force recusal on Nov. 9, 1984. A split in the Circuits on this very important matter could thus be resolved.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at and set is set forth in Appendix A, infra, pp **A1**. The order of the United States District Court for the Western District of Michigan is reported not reported and appears in Appendix B, infra, pp. **B1**. The affidavit Petitioner is reported at Appendix C. The Certificate of Counsel is reported at Appendix C.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATIONS INVOLVED

The constitutional portion of this case turns upon the due process rights guaranteed by the constitution under the due process clause which guarantees citizens a fair and impartial trial.

STATEMENT

This case involves the refusal of a Federal District Judge to disqualify himself in a civil case brought by Petitioners who had previously come before that same Judge in numerous actions involving SEC or NASD. Prior to a hearing in one of these actions SEC agent Weiss had ex parte contact with the Court staff. In Petitioners Affidavit at No. 7 page 1., they alleged such ex parte participation on the part of the SEC with a member or members of the Judge's staff. In ruling on the sufficiency of Petitioners affidavit, the Respondent ruled the Affidavit legally insufficient. The Respondent only addressed the fact that he himself had had no ex parte extrajudicial contact with Securities and Exchange Commission, hereinafter, SEC or National Association of Securities Dealers, Inc. hereinafter, NASD.

Petitioners claim that such activity by SEC was for purposes of influencing the Court and that SEC by its contact with Law Clerk Judith Bergman through its agent Mary Weiss acted knowingly for the purpose of undully influencing the Court. Would not Petitioners claimed that they have a right to be free, not only from bias and prejudice but also, the appearance of any bias or prejudice seem reasonable. Failure of Respondent judge to recuse himself where the SEC prosecutor has come to camp on the doorstep of the Court from a distant city during the week prior to such an appearance and has contact with the Court Staff, would seem

an abuse of discretion. *SCA Services, Inc. v Morgan,* 557 F2d 110 (7th Cir., 1977). If a mandamus is not the proper means as is held in the majority of the Circuits, Petitioner wonders what method must be used to obtain recusal where a technicality of the law may be used to avoid recusal? *United States v. Valenti,* 120 F. Supp 76 (D.C. NY 1954). see also *Berger v. United States,* 41 S.Ct. 230, 233, *Parrish v. Board of Commissioners,* 524 F.2d 98 (CA 5, 1975), cert denied, 425 U.S. 944 (1976).

Although a § 144 Affidavit is not self executing it is inextricable in pari materia with 28 U.S.C.A. 455 which is self executing and provides for a reasonableness standard. An affidavit and certification of good faith are not necessary requirements of recusal where impartiality might reasonably be questioned. *Simonson v. General motors Corp.,* 425 F. Supp 574, (1976).

The standards set for the recusal of a Judge have a two-fold function; to not only (a) protect the petitioner from bias or the appearance of bias, but, (b) to protect the Judiciary from the appearances of bias and it is also important to the Judiciary's right to be free from any conceptual, real or unreal, allegations that its obligation to conduct a fair trial has been abridged.

Petitioners filed an affidavit pursuant to 28 U.S.C. § 144 after drawing Judge Gibson in a civil action. Those parties who were the subject of the previous ex parte activities, (SEC and NASD) were also the Defendants in the instant case before the Respondent. *Davis v. Board of School Commissioners of Mobile County,* 517 F.2d 1044 (5th Cir., 1975).

Would not the impartiality of the Respondent be further assured by the appearance of counsel for the Defense to argue against pro se litigant at a hearing on the matter of recusal? The hearing which was the genesis of the ruling of the matter of recusal and the sufficiency of the Affidavit? Would it not appear that a recusal affidavit is an ex parte function on the part of the Court? Why would it be necessary for Defendants'

counsel to file briefs at both the lower level and at the Circuit in the matter of Respondent refusal to recuse himself? Would not a reasonable person question, why such briefs were being filed and, who is paying the law firm for such filings. Would it not follow that if the Respondent were not bias or prejudice prior to the acceptance of such counsel that he would be obligated thereafter? So in essence the Respondent sat on the hearing of his own bias and effectively used counsel for the defense as his own counsel.

In these briefs of counsel for Respondent, counsel for defendant, NASD characterized the contacts of SEC and NASD as casual in nature. Would agent Weiss travel from Chicago, Ill. to Grand Rapids and camp upon the courthouse steps for one week to engage in casual contact? Would a reasonable person construe such activity as, casual in nature? Also more specifically, was the nature of the contact once it was consumated with Respondent's law clerk Judy Bergman, really casual, would a reasonable person assume that such contact were carried out for a mere casual reason.

Would not a reasonable person wonder, why during the week prior to a specific hearing on a specific matter the prosecutor arrives in the town of the hearing and makes contact with a member of the very Court which will be hearing the complaint? *SEC v. Waco Financial, Inc. and J. Jerome Prevatte,* F. Supp 611, (W.D. Mich., 1981), could not a reasonable person assume that prosecutor Weiss had more on her mind than a casual encounter? Should the duty to prove beyond a doubt that the Contact of Weiss with the Gibson Court was other than casual? Is there a duty on the part of Petitioner to follow the numerous SEC personnel or should it be the duty of the Court to maintain such a posture so as not to have such a question raised?

Would not such activity on the part of a governmental agency in light of their regulatory duty and mandate under the 1934 Securities and Exchange Act, with its requirement of

fairness, give a reasonable person just cause for a pause? Are not such prosecutors "Officers of the Court" sworn to maintain rather than impune the integrity of one of the Great Institutions of freedom and justice? Must the burden for the prevention of such be entirely on the Court as in, *U.S. v. Kilpatrick,* (F. Supp CA Col. 198__), in that action The Honorable Judge Winner did not allow such extra judicial ex parte activity on the part of the Government to become consequential to the outcome.

A part of the question is the rights of a pro se litigant to file an affidavit of recusal. Can a pro se litigant be barred from filing an affidavit by virtue of not having counsel who can file a certificate of Counsel? Would not such a requirement be counter to the real intent of the Congress? Is not the legislative history of recusal for the purpose of avoiding the very problem which has evolved here? Would not the Congressional intent seem to be to avoid the necessity of the current involvement with every level of the Federal Court System?

Is it not important to the cause of justice and fairness that this conflict among the Circuits be resolved. The minority now are of the opinion that a mandamus is the proper means for recusal. *See* ALR Fed 954, also note 86 Harvard Law Review. 736.

DISTRICT COURT DECISION

On May 4, 1984 the Respondent issued an order and opinion which based refusal of the judge to recuse himself on the fact that the affidavit did not meet exacting standards, page 4 of opinion. This standard of exactness was supported by, *United States v. Haldeman,* 559 F.2d 31, 134 (D.C. Cir. 1976). The opinion construes § 144 and § 455 to be, *in pari materia* and thus self-executing, yet there is no recusal. In the opinion the Judge states that the allegations are conclusionary and not definite as to time and place, *Government of Virgin Islands v. Gereau,* 506 F.2d 914, 932 (3rd Cir. 1974).

The Judge refers to Mr. Prevatte's contact with reference to procedural matters as ex parte contact on the part of the Petitioner.

With reference to the truth of the affidavit the Respondent dismissed the requirement of truth and instead cited *Ronwin v. State Bar of Arizona,* 686 F.2d 692, 701 (9th Cir. 1982). In addressing the undue delay the Judge states that such is insufficient reason for recusal and cites *Oliver v. Michigan State Board of Education,* 508 F.2d 178 (6th Cir. 1974).

In the matter of Duty to sit the opinion states "a judge has a duty not to recuse himself when there is no occasion to do so, citing *Laird v. Tatum,* 409 U.S. 824, 837 (1972); and *United States v. Hoffa,* 382 F.2d 856, 861 (6th Cir. 1967).

The seeming sufficiency of all the arguments is overridden by the fact that the SEC knew the financial capability of Waco Financial, Inc. and the overhead. The firm had had some five to seven employees and leased expensive office space in a modern bank building. The Gibson ruling which took so long came at the same time that the firm had exausted its capital resources. It is also important to note that the Respondents dilatory activities were depriving the Petitioner and its employees of a livelihood where there were no allegations of fraud or misconduct.

CIRCUIT COURT DECISION

The ruling from the Sixth Circuit was based on the fact that the mandamus was not the appropriate remedy for recusal citing *City of Cleveland v. Krupansky,* 619 F.2d 576 (CA 6 Ohio 1980), and *Williams v. Kent,* 216, F.2d 342, (CA 6 1954). In the Williams case it would seem that the Sixth had ruled that mandamus was a proper means for recusal but not in that instant case.

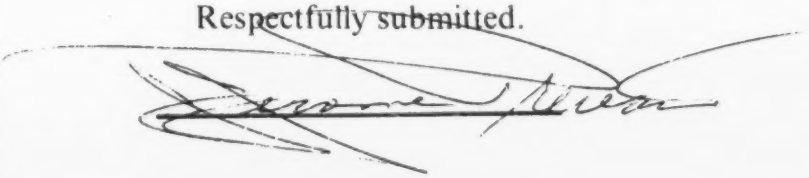
REASON FOR GRANTING WRIT

Would not the split among the Circuits provide a compelling reason for granting this writ. The settlement of any conflicting decisions in the use of a mandamus for recusal could thus be dispelled.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment and opinion of the United States Court of Appeals for the Sixth Circuit should be vacated and remanded for issuance of a writ of mandamus to resolve the very important issue of the split among the Circuits.

Respectfully submitted.



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APPENDIX

No. 84-1375

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE:

J. JEROME PREVATTE, AND
WACO FINANCIAL, INC., ET AL., ORDER

Petitioner K84-99 CA

BEFORE: KENNEDY, KRUPANSKY and WELLFORD,
Circuit Judges

This matter is before the Court upon consideration of petitioner's petition for a writ of mandamus.

On May 4, 1984, District Judge Gibson in *J. Jerome Prevatte, et al. v. National Association of Securities Dealers, Inc., et al.,* Civil No. 84-99 pending in the United States District Court, Western District of Michigan, denied petitioner's motion that he disqualify and rescue himself from that action. Petitioner via his instant petition for writ of mandamus requests this Court to disqualify Judge Gibson.

Mandamus is not the proper remedy to compel a district judge to rescue himself. Mandamus cannot be used as a substitute for an appeal. An order denying recusal is not reviewable until a final judgment has been entered in the case. *City of Cleveland v. Krupansky,* 619 F.2d 572 (6th Cir.), *cert. denied,* 449 U.S. 834 (1980) and *City of Cleveland v. Krupansky,* 619 F.2d 576 (6th Cir.), *cert. denied,* 449 U.S. 834 (1980).

It is ORDERED that the petition for a writ of mandamus be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

J. JEROME PREVATTE, AND WACO FINANCIAL, INC., et al.
Petitioner

v.

BENJAMIN F. GIBSON
Respondent.

_____/

APPLICATION FOR
WRIT OF MANDAMUS

The application for a writ here arises out of an opinion of the HONORABLE BENJAMIN F. GIBSON in District Court File No. K84-99 CA4 Southern District of Michigan. This opinion is one which arises out of a § 144 Affidavit and hearing. Under 28 U.S.C. § it should not be left to the Judge to rule on the matter of his own bias and Petitioners here have filed a sufficient affidavit for recusal. Petitioners respectfully request that this Court persuant to 28 U.S.C. § 1651 issue a Writ of Mandamus for the recusal of the Honorable Benjamin F. Gibson in the District Court Case No. K84-99 CA4 United States District Court for The Western District of Michigan Southern Division.

Respectfully Submitted

By /s/ J. Jerome Prevatte

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June 3, 1984

No. 84-1375

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RE:

J. JEROME PREVATTE, AND
WACO FINANCIAL, INC., ET AL.,

Petitioner

Motion For Reconsideration Of Action In Mandamus And On Appeal Of Order Of District Judge To Disqualify Himself

_____/

MOTION

Now comes Petitioner, J. Jerome Prevatte, and Waco Financial, Inc., et al, on Motion for Reconsideration Of Action In Mandamus And On Appeal Of Order Of District Judge To Disqualify Himself. On Oct. 4, 1984 this Court entered an order in the matter of the recusal of the judge in the lower Court. In this order the Court cited *City of Cleveland v. Krupansky,* a case in which the circumstances were far different from those herein. This Court in *Williams v. Kent,* 216F. 2d 342 (1954 CA6 Mich.), noted that such method as petitioner seeks here was available.

The request for reconsideration is made for the following reasons among others as more fully set fourth in Petitioner's supporting brief.

1. Exparte activity on the part of SEC, more specifically SEC agent Mary Weiss with the Gibson Court during the week just prior to hearing in K81-152 CA4.
2. Hearing on Affidavit for recusal heard by the same judge named in Affidavit.
3. Judge names in Affidavit was represented at the hearing on Affidavit by defendants attorney and law firm in action in which Affidavit was brought.
4. Judge stated, off the records, at close of a previous hearing that he did not wish to see these parties in his court again.

There is no lack of precedent to support a mandamus as the proper means to force recusal. This Circuit, (William v. Kent, Supra), along with the majority of the Circuits has recognized this remedy to disqualify bias or prejudice judges.

The Supreme Court of the United States recognized this remedy just on year after the formulation of § 144 by the U.S. Congress in Ex parte *American Steel Barrel Co.* 230 U.S. 35 33 S.Ct. 1007. Since this ruling was so close to the formulation of the rule there is good cause for the fact that the Court here was very cognizant of the Congressional intent that no person need stand before a biased judge or a case where there is reason to believe that a judge may be bias or prejudice.

For the above reasons as well as those set out in Petitioners brief more fully, Petitioners Respectfully Request that reconsideration be given to Petitioners request for mandamus.

Respectfully Submitted

Oct. 15, 1984

By /s/ J. Jerome Prevatte

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No. 84-1375

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE:

J. JEROME PREVATTE, AND
WACO FINANCIAL, INC., ET AL.,

Petitioner

ORDER

FILED
NOV. 9, 1984

BEFORE: KENNEDY, KRUPANSKY and WELLFORD,
Circuit Judges

This matter is before the Court upon consideration of petitioner's motion for reconsideration of this Court's October 4 order which denied a petition for writ of mandamus. A response in opposition to the motion for reconsideration has been filed.

This panel having carefully re-examined the record finds that iT misapprehended no questions of law of fact in its October 4, 1984, order which denied the petition for writ of mandamus.

It is ORDERED that the motion for reconsideration be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J. JEROME PREVATTE, et al.,

Plaintiffs,

v. File No. K84-99CA

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., et al.,

Defendants. OPINION

This matter arises out of the dealings between Waco Financial - a securities dealer, J. Jerome Prevatte - Waco's president, and the National Association of Securities Dealers (NASD). This is the fourth time that these plaintiffs have appeared before the Court in connection with their relationship with the NASD or the Securities and Exchange Commission (SEC). Waco and Prevatte have not prevailed in any of the prior actions. *See Prevatte v. NASD,* No. K83-137 CA (W.D. Mich. Nov. 7, 1983) (complaint dismissed for failure to exhaust administrative remedies); *SEC v. Waco Financial, Inc.,* 518 F. Supp. 611 (W.D. Mich. 1981) (Waco and Prevatte preliminarily enjoined from effecting any securities transactions until they are qualified to do so under SEC rules), *permanent injunction granted,* No. K81-152 CA (W.D. Mich. February 16, 1983); *Waco Financial v. NASD,* 513 F. Supp. 758 (W.D. Mich. 1981) (dismissal of complaint seeking injunction requiring SEC to stay imposition of penalties pending review), *aff'd sum nom. Waco Financial v. SEC,* ((1981-1982 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 98,220 (6th Cir. July 9, 1981).

The plaintiffs have filed an affidavit pursuant to 28 U.S.C. § seeking disqualification of the judge to whom this matter has been assigned on the basis of alleged personal bias and prejudice. Section 144 states in relevant part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists....

The Sixth Circuit recently has discussed the manner in which such an affidavit shall be considered:

> The facts in the affidavit must be accepted as true.... The facts and reasons set out in the affidavit "must give fair and adequate support to the charge of a bent of mind that may prevent or impede impartiality of judgment."... The legal standard requires the facts to be such as would "convince a reasonable man that a bias exists."... A bias sufficient to justify recusal must be a personal bias "as distinguished from a judicial one," arising "out of the judge's background and association" and not from the "judge's view of the law."

United States v. Story, 716 F. 2d 1088, 1090 (6th Cir. 1983) (citations omitted).

Section 144 must be construed *in pari materia* with 28 U.S.C. § 455, which provided in relevant part:

> (a) Any justice, judge...shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has personal bias or prejudice concerning a party....

The Sixth Circuit, in *Story,* stated that the "difference between sections 144 and 455 is that section 455 is self-executing, requiring the judge to disqualify himself for personal bias even in the absence of a party complaint. Recusal is mandated... only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." 716 F.2d at 1091. The affidavit must be considered in light of these legal standards. The relevant paragraphs of the affidavit are as follows:[1]

> 5. That avderse parties in previous actions against plaintiffs have had extensive Ex Parte participation with the Gibson court for the purposes of creating prejudice against plaintiffs in the Gibson court.
>
> ....
>
> 7. That Mary Weiss of the Securities and Exchange Commission spent one week in Grand Rapids prior to the hearing on K81-152 CA4. That during this week Weiss had contact with the Gibson court.
>
> ....
>
> 10. That the plaintiffs have appealed two cases from the Gibson court to the 6th Circuit and this alone gives reason for prejudice.

11. That the Gibson Court has evidenced such prejudice by allowing known perjury to be offered, considered and accepted as truth, see Perkowski depositions File No. K81-152 CA4.

12. On virtually the same set of facts judge (sic) John L. Kane in No. 83-K-668 Securities and Exchange Commission v. Blinder, Robinson & Co., Inc., Meyer Blinder and Larry Blinder, made a decision quickly and properly from the bench on the similar (sic) facts as presented in No. K81-152 CA4; that Gibson took nearly two years to reach a conclusion which plaintiffs feel was influenced (sic) by the SEC's ex-parte contact with the Gibson Court.

In reviewing these allegations, it is important to note that the "affidavit must meet exacting standards. It must be strictly construed, it must be definite as to time, place, persons and circumstances. Assertions merely of a conclusionary nature are not enough, nor are opinions or rumors." *United States v. Haldeman,* 559 F.2d 31, 134 (D.C. Cir. 1976) (footnotes omitted).

The allegations in paragraphs 5 and 7, are not sufficient to establish "a bent of mind that may prevent or impede impartiality of judgment" for two reasons. First, the allegations are conclusionary and not at all definite as to time place, persons and circumstances. Even if the parties had "contact" with the Court, or its staff, it is not necessarily improper. *See Government of Virgin Islands v. Gereau,* 502 F.2d 914, 932 (3d Cir. 1974) and cases cited therein. The plaintiffs do not allege that the contact involved any discussion of the merits of the cases before the Court. In fact, at the hearing on this matter, Prevatte acknowledged that he himself and *ex parte* contacts with the Court's staff regarding scheduling, procedural matters and the like. Second, although the allegations in the affidavit generally are to be taken as true, when the facts alleged are peculiarly

within the judge's knowledge they need not be so accepted. *Ronwin v. Stare Bar of Arizona,* 686 F.2d 692, 701 (9th Cir. 1982), *cert. denied,* _____ U.S. _____, 103 S.Ct. 2110 (1983). In the instant case, there was no *ex parte* contact between the presiding judge and any of the parties to any of the actions involving these plaintiffs. Nothing in the affidavit indicates that there were any *ex parte* discussions involving the merits of this prior case or that the Court itself was a party to the discussions. These allegations therefore are not legally sufficient to warrant recusal.

For the same reasons, the allegations in paragraph 11 are not sufficient to warrant recusal. Whether or not perjured statements were knowingly "considered and accepted as truth" is a matter peculiarly within the knowledge of the presiding judge. At the hearing on this matter, Prevatte stated that these allegations were made on information and belief, but the basis for them appeared to be that Prevatte disagreed with the statements.

The allegations contained in paragraph 10 are clearly insufficient. No reasonable person would be convinced of the existence of a personal bias or prejudice merely because an unsuccessful litigant appeals an adverse decision.

Finally, in paragraph 12, the plaintiffs appear to allege that disqualification is appropriate because of undue delay in reaching a decision in a prior case. The Sixth Circuit has held that this is not a sufficient basis for recusal. *Oliver v. Michigan State Board of Education,* 508 F.2d 178 (6th Cir. 1974). Insofar as this paragraph alleges *ex parte* contact as a basis for recusal, it is insufficient for the reasons stated above.

For these reasons, the Court is of the opinion that no basis for recusal under 28 U.S.C. § 144 has been established. The inquiry does not end here, however. As mentioned above, the Court also must consider whether recusal is required by 28 U.S.C. § 455.

As previously noted, the legal standard to be applied under § 455 is different from that applied under § 144. Under § 455 recusal is required if a reasonable person with knowledge of *all* the facts would question the impartiality of the presiding judge. Review under § 455 is based upon a broader factual base - i.e., not only upon the facts alleged in the affidavit - and the facts alleged by the party seeking recusal are not entitled to a presumption of truthfulness.[2] Without the benefit of this presumption, and with knowledge of all the facts, any reasonable person would conclude that the presiding judge was not personally biased against the plaintiffs. For this reason, and for the reasons expressed in relation to the allegations raised in the § 144 affidavit, the Court concludes that recusal is not required by 28 U.S.C. § 455.

It is clear that, as much as there is a duty not to sit where a judge is disqualified, a judge has a duty not to recuse himself when there is no occasion to do so. *Laird v. Tatum,* 409 U.S. 824, 837 (1972); *United States v. Hoffa,* 382 F.2d 856, 861 (6th Cir. 1967). In the instant case, there is no occasion for the presiding judge to recuse himself. The presiding judge therefore declines to do so.

Dated: May 4, 1984

/s/ Benjamin F. Gibson

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

FOOTNOTES

[1] The remaining eight paragraphs can be characterized as introductory material or as legal argument.

[2] The thoughts expressed by Judge Sirica regarding the mandatory presumption of truthfulness for 28 U.S.C. § 144 affidavits are most appropriate:

> It is...allegations like (those in the petitioner's affidavit), without the slightest support in the record, that point out the abuse inherent in a statutory disqualification procedure, which does not allow examination into whether the comments were actually made, although this is a matter of public record, and does not require any form of documentation.

United States v. Hanrahan, 248 F. Supp. 471, 477 (D.D.C., 1965).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J. JEROME PREVATTE, et al.,

Plaintiffs,

v. File No. K84-99 CA

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., et al.,

Defendants. ORDER

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 4th day of May, 1984.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated May 4, 1984, it is determined that the allegations contained in the affidavit filed pursuant to 28 U.S.C. § 144 are legally insufficient to warrant recusal of the presiding judge. The petition seeking recusal therefore is denied.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

APPENDIX

Affidavit persuant to rule § 144 Federal Rules of Civil Procedure. "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further herein,..."

Kalamazoo County)
Michigan)

AFFIDAVIT:

J. Jerome Prevatte, first being duly sworn, states the following:

1. That I am over the age of 21 and competent to make this affidavit persuant to rule 144 FRCP. in K84-99 CA4.

2. That the facts set forth herein are such as to make the Plaintiffs in K84-99 CA4 certain that Benjamin F. Gibson has a personal bias and prejudice against them.

3. That the facts set forth herein are such as to make the Plaintiffs in K84-99 CA4 certain that Benjamin F. Gibson has a personal bias and prejudice in favor of the National Association of Securities Dealers, Inc.

4. That such facts make it necessary that Benjamin F. Gibson proceed no further with K84-99 CA4.

5. That adverse parties in previous actions against Plaintiffs have had extensive Ex Parte participation with the Gibson court for the purposes of creating prejudice against Plaintiffs in the Gibson Court.

6. That such activity is not an isolated instance with respect to the Plaintiffs herein, see Americans United for Separation of Church and State v. Grand Rapids School Board this district.

7. That Mary Weiss of the Securities and Exchange Commission spent one week in Grand Rapids prior to the hearing on K81-152 CA4. That during this week Weiss had contact with the Gibson court.

8. That such activity on the part of the SEC is inappropriate and acted to prejudice the Court against Plaintiffs. Such activity is addressed in *Camero v. U.S., 1967, 375 F.2d 777, 179 Ct. Cl. 520* "Due process forbids one adversary or his representatives to privately communicate with decision makers concerning merits of pending adversary proceedings."

9. That such activity was addressed in U.S. v. Kilpatrice, et al., No. 82-CR-222 United States District Court, D. Col. 10th Circuit where the Honorable Judge Winner states "It was an atmosphere of unfairness and overreaching illustrated in small degree by ex-parte telephone calls to my law clerk made by government counsel inquiring through the back door to learn my thinking as to some legal situation in the case." Plaintiffs have also learned of numerous telephone calls from SEC to the Gibson Court, the overriding difference is the judicial response to such activity by the Winner Court and the complete disregard of it by the Gibson Court.

10. That the Plaintiffs have appealed two cases from the Gibson Court to the 6th Circuit and this alone gives reason for prejudice.

11. That the Gibson Court has evidenced such prejudice by allowing known perjury to be offered, considered and accepted as truth, see Perkowski depositions File No. K81-152 CA4.

12. On virtually the same set of facts judge John L. Kane in No. 83-K-668 Securities and Exchange Commission v. Blinder, Robinson & Co., Inc., Meyer Blinder and Larry Blinder, made a decision quickly and properly from the bench on the similar facts as presented in NO. K81-152 CA 4; that Gibson took nearly two years to reach a conclusion which Plaintiffs feel was influenced by the SEC's ex-parte contact with the Gibson Court.

Further Affiant saith not.

/s/ J. Jerome Prevatte

J. Jerome Prevatte

Subscribed and sworn to before me this 19th Day of March 1984.

/s/ Nancy L. Mayo

Notary Public

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J. JEROME PREVATTE AND WACO FINANCIAL, INC., INDIVIDUALLY AND AS ALTER EGO, OF WACO FINANCIAL, INC.,

Plaintiffs,

v.

Case No: K-84-99 CA4
CERTIFICATE OF COUNSEL

National Association of Securities Dealers, Inc., its Agents, Officers, and Board of Directors, individually, National Association of Securities Dealers, Inc., Capital and Margin Committee, individually; its Officers and Agents, more specifically, John J. Cox, Bradford Patterson, John T. Wall, James Yore, John E. Pinto, Jr., Craig Dearborn, Donald D. Watson, Bruce Wheeler, and Dennis Taylor; and unassociated persons, Jon C. Thompson and Nancy J. Barber (Rose),

Defendants.
_____/

This certificate of counsel is given for the record in the above captioned case pursuant to 28 U S C § 144 Rule of Civ. Procedure.

The Affidavit given by J. Jerome Prevatte in No. K 84-99-CA4 J. Jerome Prevatte et al v. National Association of Securities Dealers, Inc., et al, was given in good faith and affiant J. Jerome Prevatte had reason to believe that the Gibson Court, therefore the Honorable Benjamin F. Gibson has a personal bias against himself and Waco Financial, Inc. and a favorable bias toward Defendant National Association of Securities Dealers, Inc.

Statement of Counsel

By /s/ J. Jerome Prevatte
J. Jerome Prevatte
April 10, 1984

APPENDIX

Oct. 5, 1982

The Honorable Wendell A. Miles
Chief District Judge
United States District Court
For The Western District of Michigan
Southern Division
110 Michigan Ave.
Grand Rapids, Mich. 49501

Re: Securities & Exchange Commission
v.
Waco Financial, Inc. &
J.Jerome Prevatte

File No. K81-152 CA4

Dear Judge Miles:

The Essence of Justice is Speed.

The Essence of Wisdom is the knowledge and discretion relevant to its application.

We request your assistance Judge Miles in obtaining a decision in the above-captioned case.

With Kindest Regards,

J. Jerome Prevatte
President

Copy;
Securities & Exchange Commission
Chicago Office
Attn: Ms. M. Weiss

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
GRAND RAPIDS, MICHIGAN 49503

CHAMBERS OF
BENJAMIN F. GIBSON
DISTRICT JUDGE

November 4, 1982

Theodore H. Amshoff, Jr.
Attorney at Law
1445 Starks Building
455 Fourth Avenue
Louisville, Kentucky 40202

RE: SEC v. WACO FINANCIAL, INC., et al.
File No. K81-153 CA

Dear Mr. Amshoff:

Mr. Prevatte has called my office on several occasions and inquired about the status of the above matter. He has expressed some concern that no final decision has been made in this case. The record reflects that this matter was initially filed in June, 1981 and we have had several hearings which have resulted in an Order granting a preliminary injunction to the Securities & Exchange Commission which was filed July 16, 1981. Since that time there have been numerous motions filed in connection with the request for summary judgment regarding a permanent injunction. As it stands now, the status of the file is awaiting a decision by the Court.

However, it was not the intent of the Court to give priority to this case merely because the parties have submitted this matter on briefs both asking for summary judgment. It is the intent of the Court to treat this case like any other case and reach a decision in due course based upon a number of factors. First, this case will not be given priority over cases which were filed before this case was filed. In addition, we have to consider giving absolute priority to criminal cases because of the mandate of Congress to this effect. Moreover, special attention is given to habeas corpus matters, prisoner civil rights complaints and other matters involving civil liberties.

I intent to decide this case as soon as possible consistent with other priorities.

I would appreciate it if you would convey the contents of this letter to your client.

Very truly yours,

/s/ Benjamin F. Gibson

Benjamin F. Gibson
U.S. District Judge

BFG/md

cc: Mary H. Weiss
Chief Judge Miles

WACO

WACO FINANCIAL, INC. ·ISB BUILDING KALAMAZOO, MICH. 49007 PH(616) 382-1500

Dec. 14, 1982

The Honorable Wendell A. Miles
Chief District Judge
United States District Court
For The Western District of Michigan
Southern Division
110 Michigan Ave.
Grand Rapids, Mich. 49501

Re: Gibson letter 11-4-82

Dear Judge Miles:

As a citizen, and as a defendant awaiting a decision from the Federal District Court for the Western District of Michigan, I can not let Judge Gibson's letter of Nov. 4, 1982 to Mr. Theodore H. Amshoff, Jr. Esq. go unanswered.

Judge Gibson's letter addressed why we can not, why we are unable to reach a decision. None of his reasons touch the real issue which our courts need to address today. The issue I believe is referred to in legal terminology as EQUITY. Equity is what we as Citizens, hope that we can expect from our Courts. Equity is not based on the time of filing, Equity is not based on one's position in a pile, Equity does not place the criminal litigant ahead of the civil litigant; Equity seeks timely Justice for all classes of litigants.

Equity is one of the oldest principals of law, embodied in the early English Law as well, later being embraced by the earliest legal system here in our own Country, the United States of America.
Where a case at the Bar deprives a Company or an Individual from the basic right or ability to earn a livelihood by legal means the principal of Equity can logically be applied. The cause of Justice can not and thus will not be served if our Courts are to become just another governmental bureaucracy where Justice is determined by numerical order rather than by the principal of EQUITY.

With Kindest Regards,

/s/ J. Jerome Prevatte

J. Jerome Prevatte
President

Copies:
SEC Chicago Office Attn: Ms. M. Weiss
Mr. Theodore H. Amshoff, Jr. Esq.
The Hon. Benjamin F. Gibson
The Chief Clerks U.S. Supreme Court & 6th Circuit

APPENDIX

Discipline An Errant Prosecutor
By Monroe H. Freedman
New York Times January 16, 1984

The American Bar Association acknowledges that a prosecutor is a "minister of justice" whose obligation is "to seek justice, not merely to convict." It is time for the A.B.A. to turn such shibboleths into specific rules of conduct, and for the bar to enforce them against prosecutors who violate their public trust and professional responsibilities with impunity.

Violations of professional ethics by prosecutors are far too frequent. For example, attention has been focused on prosecutors — who represent the government — who systematically exclude minority-group members from juries. They do so by peremptory challenges, which lawyers may use to veto jurors without giving a valid reason. That practice is a constitutional issue because it deprives defendants of juries that represent a cross-section of the community and because it involves discrimination by officials against minority members of the jury panel.

If the practice, now under court scrutiny, is found unconstitutional, convictions by such juries should be reversed. Apart from the constitutional issue, society should recognize that such prosecutorial conduct is improper. One set of ethical rules, the American Lawyer's Code of Conduct (of which I was principal author), offered for adoption by courts nationally, forbids a prosecutor to veto jurors on grounds such as race, religion or sex—unless the defense initiates that tactic. Unfortunately, that code was not drafted by the A.B.A., which has an effective monopoly on lawyers' self-regulation. Neither the A.B.A. Model Code, nor its newly proposed Model Rules, has any provision on discriminatory jury selection by prosecutors.

Indeed, the failure of courts and disciplinary bodies to deal effectively with prosecutors who act unethically is a scandal. Even in cases in which rules are clear, little is ever done to punish an offending prosecutor. It is recognized, for example, that a prosecutor should not knowingly present perjury, suppress evidence or make inflammatory arguments to a jury. When such acts occur, an appellate court will sometimes scold him in an opinion — being careful not to embarrass him by mentioning his name. Occasionally, *but too seldom, a conviction will be reversed because of prosecutorial misconduct.* Rarely, however, will the offending prosecutor be subjected to disbarment, suspension or public censure by a disciplinary committee, even for repeated offenses.

The A.B.A. has ignored other major abuses. For example, the A.B.A.'s recent rewriting of its ethics code was prompted in part by lawyers' wrongdoing in Watergate. One of the worst abuses was the "Enemies List" — the plotting by Richard M. Nixon and John Dean, both lawyers, to use the powers of Government to take revenge on personal and political foes. There is substantial evidence that Robert F. Kennedy, as Attorney General, used the Justice Department for similar ends.

A former Supreme Court Justice, Robert Jackson, who also served as Attorney General, anticipated such abuses when he referred to the discretion to investigate as a prosecutor's *"most dangerous power."* The proper course, he noted, is for the prosecutor to discover the commission of a crime and then to look for the person who committed it, rather than "picking the man and then searching the lawbooks or putting investigators to work, to pin some offense on him."

Recognizing the unique discretion of the prosecutor, and its potential for serious abuse, the American Lawyer's Code also forbids the prosecutor to investigate or prosecute on the basis of an enemies list. The A.B.A. codes, by contrast, have no rule explicitly dealing with the issue. A comment — defined as a "guide" but not "systematic" abuse of prosecutorial discretion "could" be an ethical violation. But isn't one such violation serious enough to warrant even a censure? Such circumspect language in an ethics code is hardly calculated to reverse the practice of ignoring flagrant prosecutorial misconduct.

Another abuse is the news conference, called by the prosecutor to announce details of an indictment. Thereby, the accused is convicted by publicity, without due process. The A.B.A.'s rules expressly permit that practice (requiring only a passing and often neglected reference to the presumption of innocence). The A.B.A. even permits the prosecutor to throw in the hapless defendant's home address, his employer's name and a reference to his wife and children. By contrast, the defense lawyer is forbidden to explain in a public response why his client is innocent.

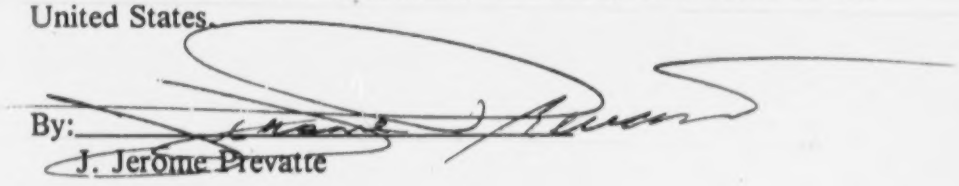
The *prosecutor,* in a *special position* as a nexus of government power, must be subject to special rules appropriate to his special role — and must be held to their scrupulous observance by effective disciplinary action.

Monroe H. Freedman is professor of law at Hofstra University.

CERTIFICATE OF SERVICE

I, J. Jerome Prevatte certify that on April 9, 1985, I caused to be served on the following parties by first class mail, postage prepaid a copy of the following:

Petition for a Writ of Certirorari, To The Supreme Court Of The United States.



By: _____
J. Jerome Prevatte

The Honorable Benjamin F. Gibson
110 W. Michigan N.W.
Grand Rapids, Michigan 49503
To the Clerk
United States Court of Appeals for
the Sixth Circuit Room 516
United States Post Office and
Court House, Cincinnati, Ohio 45202